

Received & Inspected

OCT 03 2016

FCC Mail Room

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Professional Services Council)	
Petition for Reconsideration of the FCC's)	CG Docket No. 02-278
Broadnet Declaratory Ruling)	DA 16-924
)	DA 16-878
National Consumer Law Center)	DA 16-879
Petition for Reconsideration of the FCC's)	
Broadnet Declaratory Ruling)	
)	
National Consumer Law Center)	
Request for Stay of the FCC's)	
Broadnet Declaratory Ruling)	

DOCKET FILE COPY ORIGINAL

To: Secretary, Federal Communications Commission

PROFESSIONAL SERVICES COUNCIL'S REPLY COMMENTS
IN SUPPORT OF ITS PETITION FOR RECONSIDERATION

**PROFESSIONAL SERVICES
COUNCIL**

Alan L. Chvotkin
Executive Vice President and Counsel
Professional Services Council
4401 Wilson Boulevard, Suite 1110
Arlington, VA 22203
(703) 875-8059

September 29, 2016

No. of Copies rec'd _____
List ABCDE _____

d

COMMENTS

Professional Services Council (“PSC”), by counsel, and pursuant to Sections 1.415 and 1.419 of the rules of the Federal Communications Commission (“FCC” or “Commission”), and the Public Notice, respectfully submits these reply comments in accordance with the Commission’s Public Notice, DA 16-924, “Consumer and Governmental Affairs Bureau Seeks Comment on Professional Services Council Petition for Reconsideration of the FCC’s Broadnet Declaratory Ruling,” released by the Commission on August 15, 2016.

* * * * *

PSC submits these comments to provide clarification on four issues raised in comments filed by the National Consumer Law Center (“NCLC”)¹ and Craig Cunningham.²

First, NCLC attempts to create a new rationale for the FCC’s Order – that the government can be vicariously liable for the acts of a contractor only if the contractor is an agent, and thus the FCC can provide relief to contractors only if they are agents. But that is not the basis of the FCC Order or the PSC Petition. In fact, the FCC’s order offered multiple reasons for its holding, including conforming its relief to *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016).³ And nothing in the Order or in *Campbell-Ewald* conditioned contractor immunity from TCPA liability on a common law agency relationship. Thus, as explained more fully in the PSC

¹ NCLC Comments Opposing Professional Services Council’s Petition for Reconsideration, CG Docket No. 02-278 (filed Sept. 9, 2016).

² Craig Cunningham Comments Opposing Professional Services Council’s Petition for Reconsideration, CG Docket No. 02-278 (filed Sept. 13, 2016).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Declaratory Ruling*, Declaratory Ruling, FCC 16-76, CG Docket No. 02-278, ¶¶ 9, 20–21 (rel. July 5, 2016) (“Declaratory Ruling”).

Petition, there is no legal basis upon which to conclude that common law agency is an essential ingredient in the FCC's determination that government contractors are not persons under the TCPA.

Second, NCLC wrongly speculates that, because the contractor in *Campbell-Ewald* did not receive immunity, derivative sovereign immunity does not exist. This line of reasoning ignores the fact that relief for contractors acting on behalf of the U.S. government and in accordance with the terms of a government contract and the government's directions is consistent with the Supreme Court's antecedent decision in *Yearsley v. W.A. Ross Const. Co.*⁴ There, the Court held that a government contractor could not be held liable for work completed under the authority and direction of the United States government.⁵ The Court's holding that derivative sovereign immunity exists could not be clearer.

Third, and relatedly, Cunningham misconstrues *Campbell-Ewald* as holding that a government contractor may not enjoy immunity if it violated the TCPA (or any other statute). This, too, is incorrect and would render the *Yearsley* line of cases a tautology. The respondent's inability to secure immunity in *Campbell-Ewald* was predicated on its failure to follow the government's "explicit instructions," not its alleged violation of the TCPA.⁶

Fourth, the relief sought by PSC is in the public interest because it would facilitate the government availing itself of government contractors' services where it chooses to do so, including enhancing the ability of federal government agencies to use efficient and cost-effective

⁴ 309 U.S. 18, 20 (1940).

⁵ *Id.* at 20–21.

⁶ *See Campbell-Ewald*, 136 S. Ct. at 672.

communications technology to advance their missions and communicate with the public either directly or through contractors.⁷

* * * * *

For the foregoing reasons, the Commission should (1) grant PSC's request for reconsideration of the Declaratory Ruling and (2) deny both the NCLC petition for reconsideration and its request for a stay.

Respectfully submitted,

PROFESSIONAL SERVICES COUNCIL

By: /s/ Alan L. Chvotkin
Alan L. Chvotkin
Executive Vice President and Counsel
Professional Services Council
4401 Wilson Boulevard, Suite 1110
Arlington, VA 22203
(703) 875-8059

September 29, 2016

⁷ In contrast, the Commission should accord no weight to Cunningham's arguments, which are *not* based on the public interest. Mr. Cunningham has filed at least 72 federal consumer-protection-related lawsuits, many of which allege TCPA violations. In at least one of those cases, the court recommended awarding attorney's fees to the defendants because Mr. Cunningham "brought these claims in bad faith and for purposes of harassment." *Cunningham v. Credit Mgmt., L.P.*, No. No. 3:09-cv-1497-G (BF), 2010 WL 3791104, at *6 (N.D. Tex. Aug. 30, 2010).